No. 91-1970

In the Supreme Court of the United States

OCTOBER TERM, 1992

KALITTA FLYING SERVICE, INC., ET AL., PETITIONERS

v.

G.S. RASMUSSEN & ASSOCIATES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a state law action for conversion and unjust enrichment, based on the unauthorized use of a design approval granted by the Federal Aviation Administration to obtain final certification of an aircraft modified in accordance with the approved design, is preempted by the federal system of air safety regulation or by federal patent or copyright law.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Federal Aviation Act of 1958 directs the Secretary of Transportation to promote the safety and development of air commerce by establishing "minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers." 49 U.S.C. App. 1421(a)(1). The Secretary, through the Federal Aviation Administration (FAA), has established a comprehensive set of airworthiness standards governing matters such as flight performance, structural characteristics, design, and construction. See 14 C.F.R. Pt. 23.

The law provides a three-step certification process to ensure compliance with these standards. See generally *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 804-807 (1984). First, a manufacturer wishing to introduce a new aircraft must obtain a "type certificate" from the FAA. 49 U.S.C. App. 1423(a)(2). The type certificate reflects the FAA's determination that the plane's basic design satisfies the applicable airworthiness standards. 49 U.S.C. App. 1423(a); 14 C.F.R. 21.21. It includes drawings and specifications necessary to define the configuration and design of the plane, and it specifies any operating limitations. 14 C.F.R. 21.31, 21.41. Second, in order to produce planes of an approved design, a manufacturer must obtain a "production certificate." 49 U.S.C. App. 1423(b). A production certificate reflects the FAA's determination that the manufacturing process will adequately ensure that each plane will conform to the approved design. 14 C.F.R. 21.139, 21.143. Finally, before a particular airplane may be placed in service, the owner must obtain from the FAA an "airworthiness certificate" confirming that the airplane conforms to the type certificate and is in condition for safe operation. 49 U.S.C. App. 1423(c); 14 C.F.R. 21.183.

Neither the holder of a type certificate nor the owner of a particular aircraft may modify an approved design without the FAA's further approval. Extensive changes may require the manufacturer or owner to obtain an entirely new type certificate. 14 C.F.R. 21.19. Other changes may be approved through amendment of the type certificate or, where the change is sought by a party other than the holder of the type certificate, by the issuance of a "supplemental type certificate" (STC). 14 C.F.R. 21.111-21.119. The application for an STC must be supported with data demonstrating that the plane, as modified, continues to meet airworthiness standards. 14 C.F.R. 21.115. Data submitted by the applicant, including any drawings, engineering calculations, test results

and the like, are treated by the FAA as confidential and are not made available to the public. See, *e.g.*, FAA Order No. 8110.4, ¶¶ 19-20, *reprinted in* App., *infra*, 1a-5a. The FAA does, however, reserve the right to refer to all such submitted data for whatever purposes it deems appropriate, including comparison to data submitted by other parties in support of applications for approval of similar or identical modifications. *Ibid.* Cf. 14 C.F.R. 21.303(c)(4) (replacement parts manufacturer must show that design meets airworthiness standards or is identical to one covered by a previously approved type certificate).

If the FAA concludes, on the basis of the submitted design and technical data, see 14 C.F.R. 21.115, 21.117, that a proposed modification is acceptable, it will issue an STC for the modification. An STC permits the holder to make the designated modifications on covered aircraft and, provided all other requirements are met, permits the issuance of related production or airworthiness certificates for the modified design. 14 C.F.R. 21.119, 21.183(d)(1).

The FAA informs us that it operates on the assumption that an applicant for an airworthiness certificate based on a previously issued STC will be either the holder of the STC itself or a third party acting under explicit authorization from that holder. Largely for the reasons suggested by the court below, Pet. App. 10a, the FAA has consistently refrained from expending its limited resources in verifying, or even inquiring into, the validity of that assumption in particular cases. Nonetheless, if it becomes aware that an airworthiness applicant has neither its own STC for a particular modification nor authorization from the holder of such an STC, the FAA will generally submit the application (and applicant) to more searching scrutiny.[1] Indeed, such an applicant would

[1] The FAA informs us that it would have undertaken such an enhanced review of petitioner's application for airworthiness certification if it had been aware at the time that petitioner was not

normally be required to obtain its own STC by independently supplying calculations, test results, or other data to substantiate the appropriateness and safety of the modification. See 14 C.F.R. 21.119; 14 C.F.R. 21.47, Pet. App. 43a, 44a (bottom of page) (licensing); FAA Order No. 8110.4, ¶ 20(a) (App., *infra*, 1a-2a).

2. Respondent applied to the FAA for an STC covering modifications that enabled certain DC-8 aircraft to carry cargo loads heavier than those authorized by their original type certificates. After evaluating "volumes of technical data" submitted by respondent based on "hundreds of hours of engineering work," the FAA issued the STC to respondent. Pet. App. 6a. Respondent [2] proceeded to market an "implementation kit" designed to allow owners of DC-8 aircraft to increase their cargo capacity. The kit consisted of three instruments, instructions for their installation, a flight manual supplement describing the modified aircraft's limitations and payload capacities, and a copy of the STC for use in obtaining an airworthiness certificate after the modification. See *id.* at 25a; Br. in Opp. 3-4.

Respondent has conceded for purposes of this case that neither the hardware nor the documents included in the implementation kit could be patented, copyrighted, or protected under state trade secret law. Pet. App. 25a. Respondent nonetheless sold the modification kit based on its STC to aircraft owners, using agreements that

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authorized to apply for such certification under the aegis of respondent's STC. See Pet. App. 9a n.9. As noted, however, the FAA does not normally make any independent inquiry as to authorization. See, *e.g.*, FAA Order 8110.4 ¶ 20(b) and (c)(4) (App., *infra*, 2a-3a, 4a).

[2] Like the court of appeals, Pet. App. 6a n.2, we simplify by ignoring the fact that respondent acted at times through separate entities under common control. Similarly, we follow the style of the petition, Pet. 2, in referring to petitioners Kalitta Flying Service, Inc. and Connie Kalitta Services, Inc. collectively as "petitioner."

stated that the kit was "proprietary information." [3] The buyer typically agreed that it would protect the "trade secrets" embodied in the kit, that it would not use the documentation supplied by respondent (or supply it to third parties) for purposes of developing a similar payload enhancement system, and that it would notify respondent of any subsequent change in ownership of the modified aircraft. *Id.* at 25a-26a & n.1. Respondent also attempted to protect its interests by subcontracting the manufacture of the necessary instruments to a single company. *Id.* at 26a.

Petitioner, an operator of cargo aircraft, bought two DC-8 aircraft already modified under agreements with respondent. Pet. App. 26a-27a & n.3. It also acquired a third, unmodified DC-8. The parties agreed below that operation of the unmodified aircraft as a cargo plane would have been economically infeasible. *Id.* at 21a. When respondent learned that petitioner intended to modify the third aircraft, it offered to sell petitioner its modification kit for $95,000. *Id.* at 27a. Petitioner refused that offer and proceeded to modify the aircraft itself.

Petitioner already possessed aircraft that contained copies of all the necessary drawings and installation instructions, the flight manual supplement, and the STC itself, as well as two of the three instruments needed to effect the modification. It used a parts locating firm to find the third instrument, and had some repair work done by respondent's authorized manufacturer. Using these components and the copied documents from its other planes, petitioner successfully "pirated" the modifications covered by respondent's STC. Pet. App. 27a-28a. The FAA issued an airworthiness certificate for the modified aircraft, after verifying that the modifications conformed

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[3] As respondent points out, Br. in Opp. 10-11 & n.9, there is a recognized and substantial market for previously approved aircraft modifications, including licenses for the related STCs.

to those authorized by respondent's STC, but without inquiring into the source of petitioner's documentation or its legal relationship with respondent. *Id.* at 28a-29a, 26a & n.2.

3. Respondent sued petitioner in federal court on state law theories of conversion and unjust enrichment, basing jurisdiction on diversity of citizenship. Pet. App. 7a & n.5. The district court found that, as respondent conceded, no part of respondent's modification kit was or could be patented, copyrighted, or protected by trade secret law. *Id.* at 25a, 28a-29a. Characterizing the "essence" of respondent's "awkwardly pled" claims as "the protection of an intellectual property right in the STC and the documents and instruments" comprising the implementation kit, the court held that respondent had no such right, and that in any event any "common law intellectual property right claims in the [STC] or the documents and instruments" would be preempted by federal copyright and patent laws. *Id.* at 29a. The court also rejected respondent's claim of an implied private right of action under the Federal Aviation Act or its implementing regulations. *Id.* at 30a-33a.

The court of appeals affirmed the district court's decision with respect to an implied private right of action under federal law, but reversed with respect to the state law claims and federal preemption. Pet. App. 10a-11a, 23a. Applying California law, which it noted "defines property very broadly," *id.* at 11a, the court held that respondent's interest in its STC met the three criteria essential for recognition of a property right in that State. *Id.* at 12a-14a. First, the right was "capable of precise definition: It enabled an airplane owner to obtain an airworthiness certificate for a particular design modification without the delay, burden and expense of [independently] proving to the FAA that a plane so modified will be safe." *Id.* at 13a. Second, the right was "capable of exclusive possession or control" because there were no "conceptual or practical difficulties in restricting the right

to the holder of the STC, or to someone who is a transferee or licensee." *Ibid.* Third, respondent had "established a legitimate claim to exclusivity" with respect to the right recognized by the court because it had "expended considerable time and effort" in designing and gaining FAA approval of the modification covered by the STC, thus demonstrating "the type of reasonable investment-backed expectations that give rise to a legitimate claim of exclusive control over the STC." *Id.* at 13a-14a & n.13.

Having concluded that California law would recognize a property right in the control of the particular FAA approval represented by respondent's STC, the court of appeals then held that a state-law action to vindicate that right was not preempted by federal copyright or patent law, or by the Federal Aviation Act. As to copyright law, the court concluded that respondent's claim challenged "not * * * the actual copying of the documents [involved], but * * * their use as a shortcut in obtaining a valuable government privilege—the right to modify an airplane in a particular way without going to the trouble and expense of proving that the modification meets FAA standards." Pet. App. 15a. Because the state claim was thus "predicated upon an act incorporating elements beyond mere reproduction or the like," *id.* at 15a-16a (quoting *Oddo* v. *Ries*, 743 F.2d 630, 635 (9th Cir. 1984)), the court found that it did "not interfere in any way with the operation of the copyright laws" and hence was not preempted. Pet. App. 16a.

The court acknowledged the broad preemptive sweep of federal patent law, noting that "the instruments required to modify the plane in accordance with the STC, and the entire modification process, must be protected by patent law or not at all." Pet. App. 16a. But the court distinguished, *id.* at 17a, the property right that it had identified in the use of the particular STC granted to respondent from the broader right to use the principles, ideas, or instruments covered by that STC:

> The right involved here, however, is not "patent-like" at all. [Respondent] claims no exclusive right to modify DC-8s as described in [its] STC. [Petitioner] or anyone else may perform the necessary studies and obtain an STC from the FAA—even if the modification so certified is identical to [respondent's]. See *Doyn Aircraft, Inc.* v. *Wylie*, 443 F.2d 579, 580 n.1 (10th Cir. 1971) ("[STCs] do not . . . grant exclusive rights since any number of people can acquire an STC for the same type of modification.").

In the court's view, recognizing respondent's state claim would promote, rather than conflict with, the objectives of federal patent law. First, the state claim would "foster and reward invention" by allowing respondent to "collect the fruits of [its] research." Pet. App. 17a. Second, respondent's modifications would "stimulate further innovation." *Ibid.* Third, the disclosure in the STC itself of the results of respondent's testing and experimentation, combined with the fact that petitioner "need perform only those tests and studies that establish the safety of [respondent's] modification to obtain its own STC," would "ensure free use of ideas in the public domain." *Ibid.* Because it perceived no conflict between enforcement of the state right and the federal patent laws, the court held that enforcement of the state right was not preempted. *Id.* at 17a-18a.

Finally, the court held that enforcing the state property right at issue did not conflict with anything in the federal system of aviation regulation. The court noted initially that neither the Federal Aviation Act nor the regulations implementing it "explicitly preclude recognition of a property right in STCs." Pet. App. 18a. In addition, the court found that enforcement of such a right would complement, rather than conflict with, the statutory and regulatory purpose of promoting air safety, because it would both encourage safety-enhancing innovations and enable the innovators, such as respondent, to

"maintain closer control over the alteration process, and to notify licensees of problems or improvements in the modification." *Id.* at 18a-19a. Noting that the federal regulations at issue themselves "confer exclusive privileges on the holder of an STC, and provide for transfer and licensing," the court found no conflict between state and federal law necessitating federal preemption. *Id.* at 19a-20a.

Having held that California law granted respondent a property right in its STC and that enforcement of that right was not preempted by federal law, the court of appeals ultimately concluded that as a matter of state law petitioner had "tortiously converted [respondent's] STC when it used the STC to obtain airworthiness certification for the modified DC-8." Pet. App. 20a. In addition, it held that on the facts of the case a California court would find an implied contract between the parties on a theory of unjust enrichment. *Id.* at 21a. The court left the precise terms of that contract, questions of damages, and the merits of any contractual claims relating to the other two (previously modified) aircraft acquired by petitioner to be resolved by the district court on remand. *Id.* at 21a-22a.

DISCUSSION

This case involves a particular type of federal regulatory approval that is granted based on data compiled and submitted to the government by the holder. We interpret the decision below as recognizing a narrowly defined state-law property right in the use of that approval to shorten the process of receiving subsequent similar approvals, which nonetheless remain available to any applicant that is willing and able to compile and submit similar or identical data on its own. We take no position on the accuracy of the court of appeals' interpretation of state law.[4] Assuming that such a limited right exists,

[4] Petitioner contends that the court of appeals erred in stating that the parties agreed on the application of California law, see

however, we do not believe that its enforcement would interfere with the administration of current federal law and regulations governing aircraft safety. Moreover, although any broad interpretation or expansion of the court of appeals' decision might well raise significant issues of federal preemption, we think it would be appropriate to await further developments in the lower courts before deciding whether it is necessary for this Court to address those issues. We therefore think that a grant of review in this case would be premature.

1. Petitioner argues, Pet. 5-12, that the court of appeals' decision will allow respondent to prohibit others from "referring to, or submitting a copy of" respondent's STC in connection with their own applications for FAA approvals, prohibit the FAA itself from using data submitted by respondent in evaluating applications by others for approval of similar or identical modifications, and generally "disrupt and interfere with the FAA's regulation of interstate aviation." Pet. 5, 10. We think those contentions overstate the effect of the judgment below.

a. We do not understand the decision below to prohibit an STC applicant from merely "referring to, or submitting a copy of" an STC previously granted for a similar or identical modification. See Pet. 5. The court of appeals did discern a protected interest in "[t]he right to *use* the STC as a basis for obtaining an airworthiness certificate," and stated that although petitioner was free to copy the STC and associated documents, it could be "prevented from then using these copies to obtain an airworthiness certificate." Pet. App. 15a-16a. These references to the "use" of respondent's STC may appropriately be read, however, in the context of the court's "precise definition" of the right that it held was conferred by an STC and could be protected under state law: the right

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Pet. App. 11a, and suggests that Michigan law would have been more appropriate. Pet. 9-10 & n.8. This choice-of-law argument does not appear to have been presented to or considered by the court of appeals, and at any rate does not warrant review by this Court.

"to obtain an airworthiness certificate for a particular design modification *without the delay, burden and expense of proving to the FAA that a plane so modified will be safe.*" *Id.* at 13a (emphasis added).

As explained above (see pp. 3-4, *supra*), an application for airworthiness certification for a modified aircraft is ordinarily subjected to different and more searching review if the FAA is aware that the applicant has not obtained specific authorization from the holder of an STC covering the modification. In fact, such an applicant is normally required to obtain its own STC. Yet the FAA does not use its resources to inquire into the legal relations among aircraft operators and STC holders, see Pet. App. 26a n.2, but generally relies on the representation of authorization implicit in the submission, without further comment, of a copy of another person's STC in connection with an airworthiness application.[5] In this setting, the essence of the right identified by the court of appeals consists of the ability to obtain an airworthiness certificate without enhanced review or the production of independent substantiating data, and it is the implicit misrepresentation by a new applicant that it is acting with the authorization of the holder of an existing STC that the court of appeals has, in effect, held actionable under California law. See *id.* at 20a-21a.

To be sure, ensuring greater disclosure to a federal regulatory agency than the agency itself chooses to enforce is a strange project for a State's common law of

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[5] If, for example, petitioner had supplied the FAA with a copy of an STC purloined from respondents' offices, the FAA might well have granted the requested certification without further inquiry as to authorization. Similarly, if petitioner had applied for its own STC using nonpublic engineering or test data stolen from respondent, the FAA would not normally have inquired into the origins of the submitted information in the course of evaluating its sufficiency in terms of aircraft safety. We note that in either case nothing in the federal regulatory scheme would preempt enforcement of applicable state laws against theft.

property—a project undertaken for the benefit of federal permit holders who are not otherwise entitled to the aid of state law in excluding others from copying or using the data or information on which the STC is based. Certainly a federal agency, including the FAA, could adopt rules or procedures that would obviate or preempt any such state-law right, and certainly such a right that impeded an agency's receipt of relevant information or otherwise interfered with the federal regulatory process would be so preempted. See, *e.g.*, *City of New York* v. *FCC*, 486 U.S. 57, 63-64 (1988); *Arkansas Elec. Coop. Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 388-389 (1983). Nonetheless, in the particular circumstances of this case, we do not read the court of appeals' opinion as restricting petitioner or any other applicant from pointing out to the FAA—by citation, inclusion of a photocopy, or otherwise—that its modification is identical to one for which respondent has previously received an STC.[6] Cf. 14 C.F.R. 21.303(c)(4) ("identicality" approval for parts manufacturers); 14 C.F.R. 21.183(d)(1). The FAA therefore does not expect the decision below to interfere with the normal functioning of its safety review and certification process.

b. Petitioner contends, Pet. 5-7, that the decision below conflicts with this Court's decision in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). In *Monsanto*, the Court made clear that when a private party submits otherwise proprietary information to a government agency

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[6] Similarly, we would not read the decision as recognizing any right of recovery for respondent based solely on the fact that the FAA might require a lesser showing of safety by a later applicant for an STC substantially identical to one it had previously approved. Cf. Pet. App. 12a n.11 (suggesting possibility of takings claim should there be a change in FAA's confidentiality policies). Any state law burdening the beneficiary of such a decision, made by the FAA within its statutory discretion and with full knowledge of the facts, would interfere impermissibly with the administration of federal law. This case presents no such issue.

under a comprehensive regulatory scheme, it can have no "reasonable investment-backed expectation" that the information will not be used or disclosed in ways consistent with that scheme. *Id.* at 1005-1008. Petitioner argues that the court of appeals "based its holding" on a determination that respondent had such an expectation of "exclusive rights to the data submited to obtain the STC." Pet. 7.

We do not read the court of appeals' opinion as placing any limitation on use by the FAA of data submitted by respondent or other STC applicants. As explained above (see p. 3, *supra*), it is the FAA's policy to use data supplied by prior applicants in evaluating subsequent applications filed by others if such use will help reduce the administrative resources required to ensure compliance with air safety requirements. See, *e.g.*, FAA Order No. 8110.4, ¶¶ 19-20 (App., *infra*, 1a-5a). Data so used are not disclosed to subsequent applicants or to other third parties, however, without explicit permission from the original applicant. *Ibid.* Nothing in the opinion below appears to call these procedures into question, and respondent explicitly disclaims any right to interfere with the FAA's operations or its "existing regulations and practices." Br. in Opp. 6, 11. We therefore agree with respondent that this case presents no conflict with *Monsanto*.

2. Whether the state law right recognized by the court of appeals is preempted by federal patent or copyright law is a closer question. The scope of the court's holding is not entirely clear, and if read broadly the decision might well trench impermissibly on areas reserved exclusively for federal law. Because we think the court's decision can and should be read more narrowly, however, we believe that further review of this case is unnecessary.

a. The sweep of patent preemption is broad and is founded on the principle that "States may not offer patent-like protection to intellectual creations which would otherwise remain unprotected as a matter of federal law."

Bonito Boats, Inc. v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 156 (1989). See also *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 231 (1964); *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234, 237-238 (1964). As the court of appeals recognized, however, Pet. App. 17a, the central question is whether the property right that the court found protectable under state law is "patent-like." If that right protects only nonpublic data compiled by respondent to prove the safety of its modification, and not the modification itself, we think the better answer to that question is no.

As petitioner points out, Pet. 13, "the franchise secured by a patent consists only in the right to exclude others from making, using, or vending the thing patented without the permission of the patentee." *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 463 (1922). But the court of appeals made clear that respondent claims, and the court's decision confers, "no exclusive right to modify DC-8s as described in [respondent's] STC. [Petitioner] or anyone else may perform the necessary studies and obtain an STC from the FAA—even if the modification so certified is identical to [respondent's]." Pet. App. 17a.

As we read the decision below, petitioner remains free to obtain from the FAA, in its own name, an identical STC for an identical modification; to submit identical calculations or other data supporting its application, so long as it has developed them independently or derived them from public sources (including the face of respondent's STC); and even to point out to the FAA that the modification it is proposing is identical to one previously approved in respondent's STC. Petitioner is barred only from using or referring to respondent's STC without making clear that it has not been authorized to apply for certification under respondent's authority. Such a rule may deny petitioner the benefit of material nonpublic information submitted by respondent in support of its

own STC application.[7] But that possible burden is quite similar to those imposed by state laws prohibiting the theft of private information, enforcing private contracts relating to otherwise unpatentable inventions, or prohibiting one merchant from passing off its goods as those of another. This Court has made clear that such state laws are generally valid.[8] See *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 482-493 (1974); *Aronson* v. *Quick Point Pencil Co.*, 440 U.S. 257, 262-266 (1979); *Bonito Boats*, 489 U.S. at 157-158.

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[7] Or it may not, depending on how much additional documentation the FAA chooses to require in a given case in which an applicant points out that its modification is identical to one previously approved.

[8] The "interesting and peculiar" right recognized by the court of appeals, Pet. App. 8a, bears some comparison to state laws regulating deceptive trade dress. In *Bonito Boats*, the Court quoted Judge Hand's summary of the traditional law of unfair competition:

> [T]he plaintiff has the right not to lose his customers through false representations that those wares are his which in fact are not, but he may not monopolize any design or pattern, however trifling. The defendant, on the other hand, may copy plaintiff's goods slavishly down to the minutest detail: but he may not represent himself as the plaintiff in their sale.

489 U.S. at 157 (quoting *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 F. 299, 301 (2d Cir. 1917)). In this case, similarly, the decision below leaves petitioner free to copy respondent's aircraft modification "down to the minutest detail"—but not to represent to the FAA that it is doing so with authorization from respondent. Cf. *Compco*, 376 U.S. at 238 ("A State of course has power to impose liability upon those who, knowing that the public is relying upon an original manufacturer's reputation for quality and integrity, deceive the public by palming off their copies as the original.") Of course, the analogy between "palming off" goods to consumers and failing to disclose to a federal agency information that the agency has not formally required to be disclosed is far from compelling. As noted above (see pp. 11-12, *supra*), although we do not believe further review is warranted in this case, we remain doubtful that the right recognized by the court of appeals has much to do with traditional or appropriate concerns of state law.

b. The court of appeals' delineation, Pet. App. 15a-16a, of respondent's state-law rights with respect to the copying and use of uncopyrighted materials included in respondent's modification "implementation kit," including the STC itself and respondent's flight manual supplement, is less clear and therefore more troubling. We agree with petitioner, Pet. 15, that if state law prohibited petitioner from making "practical or commercial use" of copies of respondent's STC or manual supplement, including doing so by submitting such copies to the FAA in connection with petitioner's application for its own STC, then it would be preempted by federal copyright law.

As explained above (see pp. 10-12, *supra*), however, we think the court of appeals' statement, Pet. App. 16a, that under state law petitioner could be "prevented from * * * using * * * copies [of the STC or manual supplement] to obtain an airworthiness certificate" should be limited by the context of the opinion. The decision as a whole need stand for no more than the proposition that state law may restrain petitioner from using copies of the STC or the manual to pass off its application for an airworthiness certificate as one made under license from respondent. We do not think it should be read as permitting state law to interfere with petitioner's use of copies of uncopyrighted documents in connection with petitioner's own application for an STC, or for any other purpose, so long as petitioner does not claim or imply that use of the STC was authorized by respondent.[9]

Even that narrow construction of the court's decision is not unproblematic. To the extent that the decision would require a user of uncopyrighted materials to ac-

[9] In particular, we would agree that petitioner has a federal right to use respondent's published and uncopyrighted flight manual supplement in connection with its own STC application, and even in "implementation kits" that it might compile and use or market to others once it had obtained its own STC for a modification identical to respondent's.

company those materials with an affirmative disclaimer of authorization or origin, it comes perilously close to prohibiting the mere act of public distribution—one of the rights protected exclusively by federal law. See, *e.g.*, *Computer Associates Int'l, Inc.* v. *Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992). Because of the unusual regulatory regime involved in this case, however, and in light of the court of appeals' reliance on that regime as a material part of its analysis (see, *e.g.*, Pet. App. 9a-10a), this aspect of the court's decision, even if erroneous, is likely to prove of very limited practical importance. We therefore do not think that the decision merits review on this ground.[10]

3. As is evident, our view that the decision below does not warrant review by this Court rests on our interpretation of the decision as a narrow holding applicable in an unusual context. It is possible that further

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[10] Petitioner claims that the decision below conflicts with *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, 111 S. Ct. 1282 (1991), in which this Court held that a telephone directory, although a laborious compilation of factual data, was not sufficiently original to be protected under the copyright laws. As petitioner notes, Pet. 13, the *Feist* court specifically rejected a "sweat of the brow" theory of copyright protection, see 111 S. Ct. at 1291-1295, while the court of appeals relied in part, Pet. App. 14a, on similar considerations of invested effort in determining that California law would recognize a protectable property interest in the use of the design certification that respondent obtained from the FAA. *Feist* rests, however, on "[t]he most fundamental axiom of copyright law": that no one may copyright an idea or a fact. 111 S. Ct. at 1287. That axiom has little relevance to this case, which involves protection not of respondent's idea, data, or information (which petitioner is free to copy), but of its exclusive right to proceed under a particular regulatory approval issued to it and based in large part on nonpublic data that it compiled. As discussed above (see n.8, *supra*), the cases somewhat more analogous to respondent's situation are those allowing States to protect private interests in nonpublic information and to prevent implied misrepresentation as to source. See *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. at 482-493; *Bonito Boats*, 489 U.S. at 157-158.

proceedings in this or other cases will prove that interpretation incorrect. In that event, it may be necessary for this Court to grant review at some later time in order tc prevent interference with preeminent federal interests both in aircraft safety (or another area of federal regulation) and in the protection and limitation of intellectual property rights. We think it more likely, however, that the decision below will be read narrowly and with proper deference to overriding federal concerns.[11] Further review of this case at this time would therefore be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submited.

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[11] Cf. *Miles, Inc.* v. *Scripps Clinic & Research Found.*, 810 F. Supp. 1091, 1094-1098 (S.D. Cal. 1993) (recognizing, under California law test set forth in the decision below, an intangible property interest in the "right to commercialize" a biological "cell line," but refusing to recognize a state law action for conversion of that interest).

APPENDIX

FAA Order No. 8110.4 (as revised through June 1985) reads in pertinent part as follows:

19. *RELEASE OF AND REFERENCE TO TECHNICAL DATA.*

    a. The general policy regarding information disclosure is covered in OA P 1200.2.[1]

    b. Reference to manufacturer's and certificate holder's data files by FAA engineering personnel is permissible and is not considered as infringing on the proprietary rights of the owner as long as the information is used solely by FAA engineering personnel to minimize the time and effort required for evaluation and is not disclosed to third parties who have not obtained permission from the original applicant.

20. *PROCEDURES.* The following are typical examples involving the release or other use of applicant's data.

    a. *New Type Certificate or Supplemental Type Certificate.* In order to establish compliance with the airworthiness requirements, an ap-

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[1] FAA Handbook OA P 1200.2, Release of Information by FAA Employees, was cancelled by a new Handbook 1200.2 issued in April 1969 to implement Department of Transportation regulations under the Freedom of Information Act. The current Department regulations implementing the FOIA are codified at 14 C.F.R. Pt. 310. See *id.* at 310.3, App. B, ¶ 4 ("matter submitted in confidence * * * will be held confidence to the extent deemed allowable").

plicant for a complete new type certificate or a supplemental type certificate may wish to make use of data submitted by a previous applicant or holder of a type certificate. In such cases, the later applicant will be advised to obtain and submit to FAA the written consent of the earlier applicant. If the later applicant does not obtain such consent, he will either:

(1) Be limited to a supplemental type certificate covering only the design changes which he substantiates himself, or

(2) Be required to submit complete type design data and conduct all tests required by the applicable requirements; however, in this case, the FAA may reduce its own participation in the project to the minimum necessary to substantiate compliance with the airworthiness requirements. For example, instead of making a complete evaluation, the FAA may make spot-check comparisons of the later applicant's data with the first applicant's data.

b. *Altered Aircraft, Aircraft Engine, or Propeller.* Alterations to aircraft may be approved on the basis of conformity to the supplemental type certificate data. To show conformity, the applicant for approval of the individual aircraft should have available copies of the approved installation drawings, and instructions. However, the FAA representative making the approval is not respon-

sible for determining how the applicant obtained this information.

c. *Replacement and Modification Parts.*

(1) The design data as defined by Federal Aviation Regulations, Section 21.31, submitted to the FAA to substantiate airworthiness for the certification of a product is part of the type certificate. This data should be retained in files of the FAA but may be retained by the type certificate holder providing he agrees to maintain it in the currently approved status and make it available to FAA at all times without restriction.

(2) Type design data submitted to FAA for approval shall not be disclosed without the written consent of the owner or as permitted by the provisions of Section 3 of the Administrative Procedure Act, as revised effective July 4, 1967, and Sections 902(b) and 1104 of the Federal Aviation Act of 1958.

(3) Any person may apply for design approval for modification or replacement parts for use in a certificated product. The FAA responsibility, in such cases, is to determine that the modification or replacement parts conform to the approved type design or to the applicable standards. The use of the approved type design data solely by the FAA for determining conformity of design data submitted by any applicant is not con-

sidered to be public disclosure of information.

(4) The FAA will not question the source or method by which an applicant, for a modification or replacement part approval, obtains his design information.

(5) A modification or replacement part approval may be granted when the applicant demonstrates that the modification or replacement part is identical to that of the approved type design.

(6) When the applicant does not show identicality with the approved type design, for parts other than those covered by Section 21.303(b) of the FAR or when, in the opinion of FAA, identicality of design does not substantiate an equivalent level of safety, there can be no approval based on comparison of data. In such instances, no disclosure shall be made of the nonconformity nor of any aspects of the approved type design data. The applicant will be informed that his design data does not comply with the approved type design and that he may substantiate his design by tests or other means of substantiation as provided in FAR, Section 21.305, if he wishes to pursue his request for design approval.

(7) Each region granting FAA-Parts Manufacturer Approval (PMA) fabrication system approval should maintain a sum-

mary of all replacement parts approved within the region for use on all type certificated products under the FAA-PMA system. Information on the name and address of the PMA holder, the part number of PMA part(s), and the type certificated product(s) in which part(s) is approved should be supplied to the public upon request. In the interest of minimizing the expenditure of FAA manpower, interested parties may be referred to the other regional offices and the PMA holders when the desired information is not available in the region receiving the request.

d. *Release of Data when a Type Certificate is Cancelled or the Holder of a Type Certificate Goes Out of Business Without Transferring it.* The data pertaining to such certificates may be made available to any person who appears to have legitimate need of the information to properly maintain aircraft of the type involved. However, if manufacturing is involved, the case should be referred in accordance with Handbook 1200.2A, Public Availability of Information.

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